Section II. REMARKS

Submission of Terminal Disclaimer to Obviate Double-Patenting Rejection

A terminal disclaimer is enclosed and submitted concurrently herewith under the provisions of 37 CFR §1.321(b) to obviate the provisional double-patenting rejection of claims 2-4, 12-14, 24-27, 53 and 57-62 based on copending application no. 09/874,102.

The terminal disclaimer authorizes the fee of $110 for the terminal disclaimer (37 CFR §1.20(d)) to be charged to Deposit Account No. 08-3284 of Intellectual Property/Technology Law. Authorization hereby is given to charge any additional fee or amount properly payable in connection with the entry of this response, to such Deposit Account.

Rejection of Claim 61 Under 35 U.S.C. §102(a)

In the January 15, 2003 Office Action, claim 61 was rejected under 35 USC §102(a) as being anticipated by Tea et al.[2]

The prior rejection of claim 61 under 35 USC §102(e) based on the Tea et al. reference (January 15, 2003 Office Action) has been withdrawn in recognition that Tea et al. is not competent §102(e) prior art for the present case, and that applicants' priority grandparent application 08/966,977 was filed November 10, 1997, prior to the December, 1997 publication of the Tea et al. article.

The current Office Action, however, re-asserts the Tea et al. reference on §102(a) grounds as evidence that "the method of claim 61 was known or used by others in this country prior to the filing date of 08/966,977" (page 2 of June 18, 2003 Office Action), the Office Action noting that "the date on which the transcript ["manuscript" was likely the intended term here] of the Tea document was originally submitted is February 25, 1997."

[2] Tea et al., *Journal of Microelectromechanical Systems*, vol. 6, no. 4, pg 363-372 (Dec. 1997).

The rejection is traversed.

35 USC §102(a) requires that "the invention was known or used by others in this country ... before the invention thereof by the applicant for a patent." The "known or used" means publicly known or used. As stated in MPEP §2132 (35 U.S.C. 102(a)), Section I. ("KNOWN OR USED"):

> **"'The statutory language 'known or used by others in this country' (35 U.S.C. §102(a)), means knowledge or use which is accessible to the public." *Carella v. Starlight Archery*, 804 F.2d 135, 231 USPQ 644 (Fed. Cir. 1986).'" MPEP §2132 (I.), Rev. 1, Feb. 2003**

See also MPEP §2128.02 ("Date Publication is Available as a Reference"), setting forth the apposite standard:

> **"Thus, a magazine or technical journal is effective as of its date of publication (date when first person receives it) not the date it was mailed or sent to the publisher. In re Schlittler, 234 F.2d 882, 110 USPQ 304 (CCPA 1956)."**

It therefore is evident that Tea et al. is not a competent §102(a) reference.

It is correspondingly requested that the §102(a) rejection of claim 61 based on Tea et al. be withdrawn.

CONCLUSION

Claims 2-4, 12-14, 24-27, 53, and 57-62 are patentably distinguished over the art, and in form and condition for allowance. Issue of a Notice of Allowance for the application is therefore requested.

If any issues remain outstanding, incident to the formal allowance of the application, the Examiner is requested to contact the undersigned attorney at (919) 419-9350 to discuss same, in order that this application may be allowed and passed to issue at an early date.

PATENT APPLICATION
2771-272 CON

Respectfully submitted,

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